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Cost Recovery or Contribution for Substantially Innocent PRPs under CERCLA: Morrison Enterprises v. McShares, Inc.

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COST RECOVERY OR CONTRIBUTION FOR "SUBSTANTIALLY INNOCENT PRPS" UNDER CERCLA?: *MORRISON ENTERPRISES V. MCSHARES, INC.*

INTRODUCTION

Between September 1, 2001, and August 31, 2002, the United States Court of Appeals for the Tenth Circuit decided one case that required it to interpret two sections of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[1] That case, *Morrison Enterprises v. McShares, Inc.*[2] is the principal case addressed in this survey. Under CERCLA, any party that has spent money to respond to a hazardous waste release, whether a federal or state government or a private party, may recoup the costs from parties that may have also contributed to the contamination.[3] In litigation under CERCLA, "potentially responsible parties" are referred to as "PRPs."[4] When private parties who are potentially liable clean sites themselves, they may later sue other PRPs to recoup part of their expenses.[5] This survey primarily examines the relationship between §§ 107(a) and 113(f) of CERCLA in actions between private parties.

The Environmental Protection Agency ("EPA"), the principal agency that administers CERCLA on behalf of the United States,[6] can enforce the Act in a number of ways. For example, the EPA can clean the contaminated site itself using money from the "Superfund,"[7] issue administrative compliance orders directing the PRPs to clean the site,[8] or petition a district court for an injunction to force a PRP to clean a contaminated site.[9] In addition to the federal government, state governments

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1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (2000). The text of this survey will refer to the statute as the law was originally enacted, CERCLA §§ 101-175. The footnotes of this survey, however, will refer to the most current version of the Act as codified, 42 U.S.C. §§ 9607-75 (2000).

2. 302 F.3d 1127 (10th Cir. 2002).

3. *See* Richard D. Buckley, Jr., Note & Comment, *Making A Case for Statutory Amendment to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"): Solving the Section 107/Section 113 Cause of Action Controversy*, 31 TULSA L.J. 851, 851, 852 (1996).

4. Joel Wertman, Comment, *The Importance of the Brownfields Revitalization and Economic Restoration Act in Promoting Brownfields Redevelopment*, 20 TEMP. ENVTL. L. & TECH. J. 267, 273 (2002).

5. Buckley, *supra* note 3, at 854.

6. *See* Exec. Order No. 12,580, 42 C.F.R. 52 (1987) (delegating executive enforcement powers to the EPA Administrator).

7. *See* ENVTL. PROT. AGENCY, THE SUPERFUND RESPONSE PROCESS (1998) (explaining that the Superfund is a trust fund created to pay for cleanup actions), *available at* http://www.epa.gov/superfund/contacts/sfhotlne/resp.pdf.

8. Wertman, *supra* note 4, at 273.

9. *Id.*

and Indian tribes may also bring suits under CERCLA in order to facilitate cleanup of contaminated sites.[10]

Private parties and the government may recoup cleanup costs under CERCLA through a § 107(a) cost recovery action or a § 113(f) contribution claim.[11] A cost recovery action under CERCLA is a lawsuit brought by a governmental or private party under § 107(a) to recover cleanup expenses from the parties responsible for the contamination.[12] The EPA and other parties who have cleaned a site can shift liability for the cost of the cleanup to PRPs under § 107(a).[13] In order to recover expenses from PRPs, a plaintiff must prove that "(1) the defendant is a PRP, (2) the site is a facility, (3) a release or threatened release of hazardous substance[s] has occurred," and "(4) the release caused the plaintiff to incur response costs."[14] Under § 107(a), strict liability theory applies and liability is joint and several,[15] unless the harm is divisible.[16] A defendant can avoid liability under § 107(a) by establishing an affirmative defense.[17] The statute of limitations under § 107(a) is six years.[18]

On the other hand, contribution actions are brought under § 113(f) of CERCLA.[19] Pursuant to § 113(f), "any person may seek contribution from any other person who is liable or potentially liable under section [1]07(a)."[20] Black's Law Dictionary defines contribution as "[a] tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his . . . proportionate share."[21] Therefore, contribution allows a party who has incurred a disproportionate share of response costs to identify other PRPs to share the liability.[22] A party who may be partially responsible for a spill, and hence a PRP, may use this section to lessen his expenses by suing and recouping costs from other PRPs.[23] Contribution suits may arise in three contexts: (1) when the gov-

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10. 42 U.S.C. §§ 9607(a)(4)(A), (f)(1) (2000).

11. Wertman, *supra* note 4, at 273; ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 215 (5th ed. 2000).

12. OLGA L. MOYA & ANDREW L. FONO, FEDERAL ENVIRONMENTAL LAW 171 (2d ed. 2001).

13. Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought By Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 89 (1997).

14. Wertman, *supra* note 4, at 274.

15. Ricky Pearce, Comment, *A Call for a New Policy Toward CERCLA Cleanup Costs in the Eighth Circuit: Is it Fair to Punish the PRP Who Initiates the Cleanup at a Superfund Site?*, 7 MO. ENVTL. L. & POL'Y REV. 126, 126 (2000).

16. MOYA & FONO, *supra* note 12, at 213.

17. 42 U.S.C. § 9607(b) (2000).

18. *Id.* § 9613(g)(2)(B) ("An initial action for the recovery of the costs referred to in section [107] . . . must be commenced . . . for a remedial action, within 6 years after the initiation of physical on-site construction of the remedial action").

19. Buckley, *supra* note 3, at 852.

20. 42 U.S.C. § 9613(f)(1).

21. BLACK'S LAW DICTIONARY 329 (7th ed. 1999).

22. *See* MOYA & FONO, *supra* note 12, at 212.

23. Daniel C. Chang, Comment, *CERCLA: The Problems of Limiting Contribution Claims for Potentially Responsible Parties*, 35 LOY. L.A. L. REV. 1107, 1110 (2002).

ernment sues but does not sue all PRPs and the parties named in the government action initiate a subsequent lawsuit for contribution "against the remaining unnamed PRPs; (2) when a private party incurring response costs does not name all PRPs in its reimbursement action and . . . [later contribution claims] are brought by the named PRPs against remaining unnamed PRPs; and (3) when one PRP brings a private action to recover response costs against another PRP."[24]

Under § 113(f), only several liability attaches to a defendant.[25] To establish this liability, the plaintiff must ascertain the defendant's share of the cleanup costs.[26] "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[27] The statute of limitations under § 113(f) is three years.[28]

The majority of the circuit courts of appeals have held that PRPs may only recoup cleanup costs under § 113(f), but not under § 107(a).[29] Courts that do not allow a PRP to bring a § 107(a) claim do so in large part because a PRP by definition is a party responsible for some of the contamination at the site.[30] These courts believe that allowing a party partly responsible for the contamination to reap the benefits of § 107(a) disregards the very purposes of CERCLA.[31] A plaintiff usually prefers to sue under § 107(a) because of the several procedural advantages it offers over § 113(f), which can produce very favorable outcomes for the plaintiff.[32]

However, the solutions to the controversy proposed in this survey offer a compromise to these majority courts that protects the original goal of CERCLA. That goal is the expedient "and voluntary cleanup of hazardous waste sites" by the party that contaminated the site.[33] This long-standing controversy could be resolved if courts adopted solutions such as the ones discussed below, Congress amended CERCLA to clarify standing under § 107(a) and § 113(f), or the United States Supreme Court definitively ruled on the issue.

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24. MOYA & FONO, *supra* note 12, at 213.

25. Christine D. McGuire, Case Note, Rumpke of Indiana, Inc. v. Cummins Engine Co.: *The Potentially Responsible Party's Right to Full Cost Recovery is Expanded*, 9 VILL. ENVTL. L.J. 511, 522 (1998).

26. Wertman, *supra* note 4, at 274.

27. 42 U.S.C. § 9613(f)(1).

28. *Id.* § 9613 (g)(3) ("No action for contribution for any response costs or damages may be commenced more than 3 years after- (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title . . . or entry of a judicially approved settlement with respect to such costs or damages.").

29. Wertman, *supra* note 4, at 277.

30. *Id.*

31. Lisa M. Glanvill, Note, *The Superfund's Superproblem: Will Congress Clean Up the Hazardous Wasteland of the Section 107/Section 113 Standing Controversy?*, 31 SUFFOLK U. L. REV. 153, 178 (1997).

32. Pearce, *supra* note 15, at 127.

33. Hernandez, *supra* note 13, at 86.

Part I of this survey is a broad introduction to the CERCLA statute. Part II explains the long-standing controversy over when parties are able to bring a cost recovery action versus a contribution action. Part III discusses the Tenth Circuit's application of the statute in *Morrison*. Part IV outlines cases decided by the Seventh Circuit that hold contrary to the majority of the United States Courts of Appeal. Part V explains the positions that the remaining circuits take on the controversy. Finally, Part VI is a critical analysis of the Tenth Circuit's *Morrison* decision as well as an analysis of the minority view on the controversy. Part VII proposes solutions to the controversy that take into account the policy considerations that led Congress to enact CERCLA.

I. CERCLA

A. Background

In response to the Love Canal hazardous waste disaster in 1979,[34] Congress enacted CERCLA, also known as the "Superfund" law,[35] in December 1980.[36] At the time that the CERCLA was enacted, other laws were in force that dealt with improper disposal of hazardous wastes and contamination of water—among them, the Resource Conservation and Recovery Act of 1976[37] and the Clean Water Act of 1972.[38] However, these statutes did not directly address the cleanup of most contaminated sites and were not sufficiently comprehensive.[39] For example, the cost of cleaning hazardous waste sites has soared astronomically over the past two decades. In the 1980s the average cost to clean a single site ranged "from six to ten million dollars per site."[40] Today, "the cost has increased to nearly thirty to fifty million dollars."[41] To address these costs, CERCLA imposes harsh penalties on parties responsible for releasing hazardous wastes into the environment. In a traditional cost recovery action, a party can potentially incur "the total of all costs of response plus $50,000,000 for any damages."[42] A court can impose treble damages to penalize a party who "fails without sufficient cause" to clean a site.[43]

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34. MOYA & FONO, *supra* note 12, at 159. In Niagara Falls, New York, the Board of Education built an elementary school over the Love Canal dumpsite of highly toxic waste. *Id.* Local officials then allowed construction of a residential subdivision next to that contaminated site. *Id.* Following the evacuation of over 230 families from the area, residents brought suit seeking over two billion dollars for personal injury, including many miscarriages, birth defects, and catastrophic property damage. *Id.*

35. *Id.* at 205.

36. *Id.* at 159.

37. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (2000).

38. Clean Water Act of 1972, 33 U.S.C. §§ 1251-1387 (2000).

39. Glanvill, *supra* note 31, at 156; McGuire, *supra* note 25, at 512; John M. Hyson, *"Fairness" and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA*, 21 HARV. ENVTL. L. REV. 137, 139 (1997).

40. Chang, *supra* note 23, at 1108.

41. *Id.*

42. 42 U.S.C. § 9607(c)(1)(D) (2000).

43. *Id.* § 9607(c)(3).

Accordingly, CERCLA has had a tremendous impact on shifting cleanup costs from the taxpayer to the parties responsible for releasing the hazardous wastes into the environment.[44]

Congress amended CERCLA in 1986 "with the Superfund Amendments and Reauthorization Act ("SARA")."[45] In addition to increasing the Superfund coffers, SARA codified the right of contribution for parties that initially bore the cost of site cleanup in § 113.[46] By amending CERCLA in this way, Congress attempted to "clarify and confirm a judicially established right to contribution under . . . [§] 107."[47] Before SARA, CERCLA contained no express mechanism for a party to recover from another when it paid more than its share of cleanup costs.[48] SARA also added § 113(f)(2) to CERCLA.[49] This section grants statutory protection from § 113(f) contribution claims to any PRP who settles with the United States government.[50] This section however, does not protect a PRP from future *§ 107(a)* cost recovery claims.[51]

Finally, CERCLA liability is retroactive, meaning that the EPA may hold parties liable for the costs of cleaning releases that occurred before the statute's 1980 enactment.[52] "This holds true even if the" release "was customary and legal" when it occurred.[53]

B. Purpose

CERCLA's "purpose is to establish a 'comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.'"[54] One of the goals of the Act is, therefore, to facilitate the expedient and voluntary cleanup of environmentally contaminated sites, "such as old landfills, industrial sites, and mining sites."[55] The "second goal is to encourage the careful handling of hazardous wastes."[56] CERCLA accomplishes this by shifting the costs of cleanup efforts from taxpayers to parties responsible

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44. Chang, *supra* note 23, at 1108.
45. Buckley, *supra* note 3, at 857.
46. 42 U.S.C. § 9613(f)(1).
47. Buckley, *supra* note 3, at 857.
48. *In re* Reading Co., 115 F.3d 1111, 1118 (3d Cir. 1997).
49. *See Reading*, 115 F.3d at 1119.
50. 42 U.S.C. § 9613(f)(2).
51. Martin A. McCrory, *Who's on First: CERCLA Cost Recovery, Contribution, and Protection*, 37 AM. BUS. L.J. 3, 25 (1999).
52. ENVTL. PROT. AGENCY, SUPERFUND LIABILITY, ENFORCEMENT, AND SETTLEMENTS 7-8 (1998), *available at* http://www.epa.gov/superfund/contacts/sfhotlne/liab.pdf.
53. MOYA & FONO, *supra* note 12, at 208.
54. *See* Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1132 (10th Cir. 1999) (quoting Pub. Serv. Co. Colo. v. Gates Rubber Co., 175 F.3d 1177, 1181 (10th Cir. 1999)).
55. Chang, *supra* note 23, at 1108; *see* McGuire, *supra* note 25, at 516.
56. Chang, *supra* note 23, at 1108.

for releasing the hazardous waste into the environment.[57] This is known as the "polluter pays" principal.[58]

C. Determining Liability

Section 107(a) makes "covered persons" liable for contamination of property.[59] There are four categories of covered people: (1) owners and operators of facilities where the spill occurred,[60] (2) any party that owned or operated the facility where the spill occurred at the time the hazardous substances were disposed of at the facility,[61] (3) any party that arranged for the disposal of hazardous substances at the facility,[62] and (4) any party that accepted hazardous waste for transport to the facility if that party selected the facility as the destination for the waste.[63] Plaintiffs may recover "any . . . necessary costs of response incurred."[64] Once the EPA or a private party identifies the PRPs and a PRP incurs or anticipates the extent of the cleanup costs, a court determines the extent of each PRP's liability.[65] "The extent of liability determines whether" a court will hold a party responsible for all or only part of the cleanup expenses.[66]

D. Defenses to CERCLA Liability—§ 107(b)

Section 107(b) provides very limited defenses to liability. It reads in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish . . . that the release . . . of a hazardous substance and the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes . . . that (a) he exercised due care with respect to the hazardous substances concerned . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.[67]

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57. McCrory, *supra* note 51, at 9.
58. *Id.*
59. 42 U.S.C. § 9607(a)(4).
60. *Id.* § 9607(a)(1).
61. *Id.* § 9607(a)(2).
62. *Id.* § 9607(a)(3).
63. *Id.* § 9607(a)(4).
64. *Id.* § 9607(a)(1).
65. MOYA & FONO, *supra* note 12, at 204-05.
66. *Id.* at 205.
67. 42 U.S.C. § 9607(b)(1)-(3).

People rarely invoke the first two defenses and the facts of a case only rarely justify their application.[68] The third defense, often called the "innocent landowner defense", remains the most frequently used.[69] It "appropriately applie[s] if the contamination did not occur in connection with a 'contractual relationship,' such as where a third party dumps waste in the middle of the night on the defendant's property."[70] The innocent landowner defense shifts the burden of proving causation to the defendants to prove that a contractual relationship exists. [71] The defendants must then prove that the third party's acts or omissions were the sole cause of the release, the defendant exercised due care, and the defendant took precautions against any foreseeable acts and omissions by the third party and against the foreseeable consequences of any acts or omissions.[72]

E. Advantages of a § 107(a) Claim Versus a § 113(f) Claim

Plaintiffs would prefer to bring claims under § 107(a) rather than § 113(f) because of the advantages a cost recovery claim offers over a contribution claim.[73] However, courts only reluctantly allow a PRP to bring cost recovery actions against other PRPs.[74]

The most significant advantage of recovery under § 107(a) is that a plaintiff can recover *all* cleanup costs from a defendant if a court finds the defendant joint and severally liable under a strict liability theory.[75] Joint and several liability allows a plaintiff to recover damages from any one of the defendants.[76] Black's Law Dictionary defines strict liability as "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe."[77] A court automatically considers a party "to be 'strictly liable' if" the party is one of the four types of PRPs.[78] If, for example, the EPA brings an action against a PRP under § 107 and wins a joint and several judgment, "the EPA may recover *all* of the cleanup costs of the cleanup from that [single] PRP."[79] If there are other PRPs, then the PRP who was sued by the EPA may only obtain judgments against the other PRPs for their "proportionate shares of the liability."[80] That PRP "may not fully

68. ENVTL. PROT. AGENCY, *supra* note 52, at 9.
69. *Id.*
70. MOYA & FONO, *supra* note 12, at 218.
71. *Id.*
72. McCrory, *supra* note 51, at 15-17.
73. *See* Glanvill, *supra* note 31, at 164.
74. McGuire, *supra* note 25, at 523-24.
75. Hernandez, *supra* note 13, at 84; McGuire, *supra* note 24, at 523.
76. BLACK'S LAW DICTIONARY 926 (7th ed. 1999) ("Liability that may be apportioned either among two or more parties or to only one or a few select members of the group . . . . Thus, each liable party is individually responsible for the entire obligation").
77. *Id.*
78. MOYA & FONO, *supra* note 12, at 210.
79. *See* Hernandez, *supra* note 13, at 84 (emphasis added).
80. *Id.* at 84-85.

shift liability [to another PRP] as the EPA can in its cost recovery action."[81] Finally § 107(a) has a longer statute of limitations than § 113(f)—six years as opposed to three.[82]

By contrast, if a plaintiff brings a § 113(f) claim, he does not have as many procedural advantages as he would under § 107(a).[83] This fact gives the defendant several advantages that he would have not had if the plaintiff sued under § 107(a).[84] Under § 113(f), the court equitably allocates liability based on care and fault.[85] The defendant then has the opportunity to lessen his response costs.[86] This in turn may leave the plaintiff responsible for more than his fair share of cleanup costs.[87] Also, liability is several under § 113(f), as opposed to joint and several liability under § 107(a).[88] Therefore, each defendant remains liable only for "its proportionate share of the total response costs, and is not responsible for costs" attributable to others, such as orphan shares discussed below.[89]

Another important difference between claims under the two sections is the effect of § 113(f)(2) on each. As noted above, § 113(f)(2) provides statutory protection from § 113(f) contribution claims to PRPs who settle their liability for contaminating a site with the United States government.[90] This section, however, does not explicitly protect a PRP from future § 107(a) cost recovery claims brought by non-settling parties.[91] In addition, plaintiffs may still bring other claims not included in that settlement.[92] So PRPs prohibited from bringing a contribution action under § 113(f) often choose to bring a § 107(a) action in an attempt to avoid the protections of § 113(f)(2).[93]

II. THE CONTROVERSY

After Congress enacted SARA, two express causes of action were available to a party that incurred response costs.[94] However, Congress did not specify whether PRPs have standing to bring § 107(a) cost recovery actions or whether CERCLA limits PRPs to contribution actions under § 113(f).[95] As a result, federal courts disagree about how to interpret

81. *Id.* at 85.
82. 42 U.S.C. § 9613(g)(2)(B), (g)(3).
83. *See* Pearce, *supra* note 15, at 127-28.
84. *Id.* at 128.
85. McCrory, *supra* note 51, at 23. Under § 113(f)(1), "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1).
86. McCrory, *supra* note 51, at 24.
87. *Id.*; Pearce, *supra* note 15, at 128.
88. Buckley, *supra* note 3, at 857.
89. McCrory, *supra* note 51, at 24.
90. 42 U.S.C. § 9613(f)(2).
91. *Id.*
92. Glanvill, *supra* note 31, at 165.
93. Buckley, *supra* note 3, at 863.
94. McGuire, *supra* note 25, at 523.
95. Glanvill, *supra* note 31, at 155.

this new language.[96] An outgoing Congress hastily enacted CERCLA "in the closing days of a lame-duck session," so the scarce legislative history does not help to clarify this confusion.[97]

The broad language of § 107(a)(4)(B) states that PRPs are liable for "any other necessary costs of response incurred by *any other person*."[98] This language makes it seem that a PRP can file a cost recovery action.[99] However, CERCLA's history and case law have indicated otherwise.[100] Most courts of appeals, despite the vague language of the statute, have held that the remedies available to PRPs are limited depending on the party's motivation for seeking cost recovery under § 107(a).[101] After SARA codified the right to contribution, courts disagreed over whether PRPs could bring cost recovery claims or whether they were limited to contribution claims.[102]

A large factor in this controversy is costs called orphan shares.[103] Orphan shares are the response costs that are attributable to insolvent or unidentifiable entities.[104] These response costs can be quite substantial in multimillion-dollar litigation cases.[105] Under § 107(a), all parties bear the orphan share costs except the plaintiff.[106] Under § 113(f), the court has the authority to equitably allocate orphan shares among plaintiffs and defendants.[107] Therefore under § 113(f), the plaintiff may also bear the costs of orphan shares.[108]

Courts have essentially taken three different approaches to the controversy.[109] The majority of courts of appeals have adopted the first approach and interpret CERCLA to mean that PRPs may only sue for contribution under § 113(f) to recoup cleanup costs and may not sue under § 107(a) for cost recovery.[110] According to the minority of courts of appeals that have adopted the second approach, PRPs may sue under § 107(a) for joint and several liability to recoup cleanup costs.[111] Under the

96. Buckley, *supra* note 3, at 857.
97. Hernandez, *supra* note 13, at 83.
98. 42 U.S.C. § 9607(a)(4)(B) (2000) (emphasis added).
99. Hernandez, *supra* note 13, at 104-05.
100. Buckley, *supra* note 3, at 852.
101. Ann Alexander, *Standing Under Superfund §§ 107 and 113: Avoiding the Error of the Blind Man and the Elephant* (pt. 1), 10 TOXICS L. REP. 155, 155 (1995). For example, if a PRP is bringing a § 107(a) cost recovery action simply to take advantage of the longer statute of limitations or to circumvent § 113(f)(2) protection, courts generally disallow the § 107(a) claim. *Id.* However, if the PRP is bringing the § 107(a) claim in order to seek joint and several liability, courts are more willing to allow the claim. *Id.*
102. *See* Hernandez, *supra* note 13, at 105.
103. *Id.* at 84; Pearce, *supra* note 15, at 128.
104. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 323 (3d ed. 2000).
105. Buckley, *supra* note 3, at 858.
106. Pearce, *supra* note 15, at 128.
107. *Id.*
108. *See id.*
109. Hernandez, *supra* note 13, at 106.
110. *Id.*
111. *Id.*

third approach, PRPs are allowed to bring a § 107(a) cost recovery claim, but liability is determined the same way as in claims for contribution under § 113(f).[112] A PRP who bore the entire cost of a cleanup will want to share responsibility for any orphan shares with other PRPs.[113] However, if the court imposes several liability and requires the other PRPs to pay only for their shares of the liability, the PRP who bore the cost of the cleanup cannot share the orphan shares.[114]

The U.S. Supreme Court has not definitively ruled on this issue.[115] However, in *Key Tronic Corp. v. United States*,[116] the Court stated that CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107."[117] Key Tronic and several other PRPs contaminated a landfill.[118] It filed suit to recover the costs of cleaning the site under § 107(a).[119] The Court held that Key Tronic could recover the portion of the costs related to identifying other PRPs under § 107(a)(4)(B).[120] According to some courts, this ruling implies that a PRP has standing to assert a response claim under § 107.[121] Other courts, however, disagree and hold that the references to § 107 were dicta and, therefore, *Key Tronic* "provides no guidance on the issue."[122]

Before *Morrison*, the Tenth Circuit last addressed this issue in *United States v. Colorado & Eastern Railroad Co.*[123] In *Colorado & Eastern*, the United States sued all known PRPs, including the defendant, the current owner of the site, and the plaintiff, the previous owner of the site.[124] The plaintiff then brought an action against the defendant for cost recovery under § 107(a).[125] The Tenth Circuit held that the plaintiff's claim could only proceed with an action for contribution under § 113(f).[126] The court reasoned that "[t]here is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution."[127] The court stated that "were PRPs . . . allowed to recover . . . from other PRPs under § 107's strict

112. *Id.*
113. *See id.* at 85.
114. *Id.*
115. Pearce, *supra* note 15, at 129.
116. 511 U.S. 809 (1994).
117. *Key Tronic*, 511 U.S. at 816.
118. *Id.* at 811.
119. *Id.* at 812.
120. *Id.* at 820.
121. *See* Pearce, *supra* note 15, at 129.
122. *Id.*
123. 50 F.3d 1530 (10th Cir. 1995).
124. *Colo. E. R.R. Co.*, 50 F.3d at 1533.
125. *Id.*
126. *Id.* at 1536.
127. *Id.*

liability scheme, § 113(f) would be rendered meaningless."[128] The court focused solely on the fact that the plaintiff and the defendant were PRPs in barring the plaintiff from bringing a § 107(a) cost recovery claim.[129]

III. TENTH CIRCUIT COURT OF APPEALS

A. Morrison Enterprises v. McShares, Inc.[130]

1. Facts

Morrison Enterprises ("Morrison") owned grain elevators in Salina, Kansas.[131] McShares, Inc. ("McShares") supplied grain fumigants, which contained carbon tetrachloride, to Morrison to use in the grain elevators.[132] In November 1963, while unloading a delivery to Morrison, a McShares employee spilled fumigants on Morrison's property.[133]

In 1988, the Kansas Department of Health and Environment ("KDHE") tested water wells on the property next to Morrison's and found carbon tetrachloride contamination.[134] KDHE issued an administrative order requiring Morrison to investigate the contamination.[135] Morrison then hired an environmental consulting firm to investigate the contamination.[136] Thereafter, Morrison entered into a consent order with KDHE in 1992, under which Morrison agreed to investigate and to clean up the spill.[137] By 1997, Morrison had spent over $430,000 to comply with the consent order.[138] Morrison then sued McShares, seeking monetary damages to recover cleanup costs and a declaratory judgment that McShares would be liable for future cleanup costs.[139]

Morrison failed to comply with the district court's disclosure deadlines, so district court issued a preclusion order that prevented Morrison from calling expert witnesses at trial.[140] At the 1997 trial, the district court excluded some of Morrison's evidence because of the preclusion order.[141] However, it found that Morrison met its burden of establishing all but two of the prima facie elements of liability under CERCLA.[142] The court found that Morrison's inability to call expert witnesses fatally

128. *Id.*
129. *Id.*
130. 302 F.3d 1127 (10th Cir. 2002).
131. *Morrison*, 302 F.3d 1130.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 1130-31.
139. *Id.* at 1131.
140. *Id.*
141. *Id.*
142. *Id.*

affected its ability to meet its burden on the above two points.[143] The court ordered judgment for McShares on monetary claims and declaratory judgment for Morrison on prima facie elements of liability.[144] Morrison appealed, arguing that the court should have issued a declaratory judgment establishing the extent of McShares's liability for cleanup costs.[145]

2. Decision

The Tenth Circuit Court of Appeals began its analysis by stating that in *Sun Co. v. Browning-Ferris, Inc.*[146] it held that "where one PRP sues another PRP for reimbursement of cleanup costs . . . the plaintiff PRP must proceed under the contribution provisions of § [1]13(f) and is barred from proceeding under § [1]07(a)."[147] The Tenth Circuit noted that in order to determine whether Morrison could proceed under § 107(a), the court had to determine whether or not Morrison was a PRP.[148] It concluded that Morrison was a PRP because it owned the facility, unless it qualified for one of the defenses described in § 107(b).[149] Morrison argued that it qualified for one of these defenses.[150] However, the court dismissed that argument because Morrison had a contractual relationship with McShares that called for delivery of the fumigant when the spill occurred.[151] Therefore, Morrison did not qualify for the § 107(b)(3) third party defense.[152]

Morrison then argued that even if it did not qualify for a § 107(b)(3) defense, it was an innocent PRP and the court should allow it to "pursue recovery under § [1]07(a) because 'it ha[d] no responsibility for the spill.'"[153] Morrison, attempted to reap the procedural benefits that suing under § 107(a) offers over § 113(f), claiming that *Sun Co.* created an "innocent PRP" exception to the rule that PRPs cannot bring suit under § 107(a).[154]

The Tenth Circuit noted that the Seventh Circuit explicitly held that a PRP who does not qualify for a defense under § 107(b)(3) may still pursue an action under § 107(a) if the PRP establishes "innocent" landowner status sufficiently.[155] The court also stated that a few federal courts of appeals' decisions have also indicated in dicta that even PRPs

143. *Id.*
144. *Id.*
145. *Id.* at 1132.
146. 124 F.3d 1187 (10th Cir. 1997).
147. *Morrison*, 302 F.3d at 1133.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 1134.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

who cannot rely on the § 107(b) defenses might still proceed under § 107(a) if their liability results solely from their status as landowner and not from contribution to the contamination.[156] However, the Tenth Circuit pointed out that it did *not* decide the issue in *Sun Co.* as Morrison argued.[157] More emphatically though, the court stated that the Seventh Circuit's exception does not comport with the underlying purposes of CERCLA.[158]

The Tenth Circuit noted that under § 107(a), if the landowner successfully establishes the defendant's liability, the entire cost automatically shifts to the defendant under strict joint and several liability.[159] However, under § 113(f), even if the landowner proves the defendant's liability, the landowner must also prove how liability should be divided between the parties, "including, potentially, the plaintiffs."[160] Therefore, under § 113(f), "'innocent PRPs' may bear some of the costs."[161] The Tenth Circuit doubted that this would ever be the case though because truly innocent PRPs should be apportioned the entire cost.[162]

The Tenth Circuit concluded that Morrison was a PRP because it was the landowner and because it could not rely on the § 107(b) defenses.[163] As a PRP, the court concluded that it could only proceed with a contribution action under § 113(f).[164]

IV. OTHER CIRCUITS

In addition to the Tenth Circuit, the First, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits also prohibit a PRP from bringing a § 107(a) recovery action.[165] The majority of circuit courts reason that all PRPs are by definition responsible parties and must, therefore, contribute to cleanup costs.[166]

A. First Circuit

In *United Technologies Corp. v. Browning-Ferris Industries, Inc.*,[167] the First Circuit held that a liable party could only recoup costs under §

156. *Id.*
157. *Id.* "We express no opinion on whether PRPs who assert their *innocence* with regard to any waste at a site may be able to recover all of their costs from other PRPs in an action under § 107." *Sun Co.*, 124 F.3d at 1191 n.1.
158. *Morrison*, 302 F.3d at 1134.
159. *Id.*
160. *Id.* at 1135.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. Chang, *supra* note 23, at 1121. The Eighth Circuit has not decided a case on point, but has indicated that it would bar PRPs from bringing a § 107(a) action. *Id.*; Pearce, *supra* note 15, at 126; *see* Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995). The Second Circuit also has not directly ruled on this issue. *See* Pearce, *supra* note 15, at 130.
166. *See* Wertman, *supra* note 4, at 277.
167. 33 F.3d 96 (1st Cir. 1994).

113(f).[168] In *United*, the Plaintiff entered into a consent decree with government officials and some other PRPs and incurred significant costs in the cleanup.[169] The Plaintiff then sued several parties alleging the Defendants were "wholly or partially responsible" for the contamination.[170] The court, noted that the Plaintiff admitted that it was liable and rejected the possibility of a cost recovery claim because "it is sensible to assume that Congress intended only innocent parties--not parties who were themselves liable--to be permitted to recoup the whole of their expenditures."[171]

B. Third Circuit

In *In re Reading Co.*,[172] the Third Circuit held that "in an action which presents a claim for apportionment of clean-up costs, § 113(f) trumps § 107(a)(4)(B)."[173] There, Conrail, a PRP, sued the bankrupt Reading Co. under § 107(a) for cleanup costs of a site in Douglassville, Pennsylvania.[174] The Court stated that "a principal goal of § 113(f) was to 'clarif[y] and confirm[ ] the right of a person held jointly and severally liable under CERCLA to seek contribution from other [PRPs], when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.'"[175] The Court concluded that § 113(f) "replaced the judicially created right to contribution under § 107(a)(4)(B)."[176] It said that Conrail sought contribution from Reading and that "such a claim must be brought under § 113(f), not under § 107(a)."[177] In the end, however, the court held Reading not liable to Conrail because of Reading was bankrupt.[178]

In *New Castle County v. Halliburton NUS Corp.*,[179] the Third Circuit held that a PRP landfill owner could only bring a § 113(f) contribution claim against other PRPs.[180] The owner-operator of a contaminated landfill sued, claiming the defendant was responsible "for all or part of the response costs incurred" in cleaning up the site.[181] The court held that the plaintiff could not bring an action for cost recovery[182] and noted that §§ 107 and 113 work together to "provide" and "regulate" a PRP's right

168. *United*, 33 F.3d at 100-01.
169. *Id.* at 97.
170. *Id.*
171. *Id.* at 100.
172. 115 F.3d 1111 (3d Cir. 1997).
173. *Reading*, 115 F.3d at 1117.
174. *Id.* at 1116.
175. *Id.* at 1119 (first two alterations in original).
176. *Id.*
177. *Id.* at 1121.
178. *Id.* at 1126.
179. 111 F.3d 1116 (3d Cir. 1997).
180. *See* Wertman, *supra* note 4, at 280 (quoting *New Castle*, 111 F.3d at 1120).
181. *New Castle*, 111 F.3d at 1119.
182. *Id.* at 1126.

to contribution.[183] The court recognized that "[s]ection 113 provides potentially responsible persons with the appropriate vehicle for such recovery."[184]

C. Fourth Circuit

In *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*,[185] Axel operated a petroleum refinery on the piece of property that was at issue.[186] Axel left the property in 1984, but by 1995 the EPA discovered extensive contamination.[187] Axel refused to admit liability for the pollution, but entered into an administrative order with the EPA whereby it agreed to pay for and conduct the cleanup of the property.[188] Axel then sued Carroll, the current owner of the property, under §§ 107(a) and 113(f) to recover its cleanup costs.[189] Axel argued that even if it was a PRP, the court should allow it to bring a cost recovery action because it was an "innocent" party with respect to some of the contamination.[190] The Fourth Circuit rejected this argument and ruled that "potentially responsible persons cannot sue under § 107" because this section "protects the strict liability scheme created by the statute."[191] The court explained that the exception only applies to truly innocent parties, which Axel was not because overwhelming evidence pointed to Axel as the major polluter.[192]

D. Fifth Circuit

In *Amoco Oil Co. v. Borden, Inc.*,[193] a landowner argued that he did not know of the contamination when he bought the land that was at issue.[194] However, the court held that the landowner of a contaminated site shares joint and several liability and limited the landowner to a § 113(f) claim.[195] The court applied both §§ 107(a) and 113(f), using § 107(a) to determine the existence of liability and § 113(f) to apportion liability.[196] The Fifth Circuit held that a court must ascertain each responsible party's equitable share of the cleanup costs under CERCLA's contribution provision.[197]

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183. *Id.* at 1122.
184. *Id.*
185. 191 F.3d 409 (4th Cir. 1999).
186. *Axel Johnson*, 191 F.3d at 412.
187. *Id.* at 412, 413.
188. *Id.* at 413.
189. *Id.*
190. *Id.* at 415.
191. *Id.* at 416.
192. *Id.*
193. 889 F.2d 664 (5th Cir. 1989).
194. *Amoco*, 889 F.2d at 666.
195. *Id.* at 672.
196. *See* Hernandez, *supra* note 13, at 111-12.
197. *Amoco*, 889 F.2d at 668.

E. Sixth Circuit

Centerior Service Co. v. Acme Scrap Iron & Metal Corp.[198] involved a PRP seeking to recover the costs of responding to hazardous waste under § 107(a).[199] Centerior, the plaintiff and parent company of a previous owner, never contested its status as a PRP and the court held it liable.[200] The court stated that "[c]ost recovery actions by parties not responsible for site contamination are joint and several cost recovery actions governed exclusively by § 107(a). Claims by PRPs, however, seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by . . . § 113(f)."[201]

Years earlier, however, in *Velsicol Chemical Corp. v. Enenco, Inc.*,[202] the Sixth Circuit implicitly held that a PRP *could* bring a § 107(a) cost recovery action if the PRP voluntarily cleaned up the site.[203] In *Velsicol*, the plaintiff brought a § 107(a) claim, alleging the defendant's responsibility for the contamination of a site that the plaintiff cleaned up.[204] The court found that the defendant failed to establish one of the § 107(b) defenses to liability and allowed the plaintiff to bring a cost recovery action.[205] The main distinction between this case and *Centerior* was that Velsicol cleaned the site voluntarily,[206] whereas the EPA issued a unilateral administrative order that led Centerior to cleanup the contamination at issue there.[207]

F. Ninth Circuit

The Ninth Circuit, in *Pinal Creek Group v. Newmont Mining Corp.*,[208] refused to allow the plaintiff-PRP to proceed under § 107(a).[209] The plaintiff, although it admitted its own liability, commenced an action to recover the expenses it incurred in the voluntary cleanup from other PRPs.[210] The court stated that "[b]ecause all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution."[211] The Ninth Circuit said equity and fairness required that the plaintiff be limited to a contribution claim, and distributed responsibility

198. 153 F.3d 344 (6th Cir. 1998).
199. *Centerior*, 153 F.3d at 346.
200. *Id.*
201. *Id.* at 350.
202. 9 F.3d 524 (6th Cir. 1993).
203. *See Velsicol*, 9 F.3d at 530.
204. *Id.* at 527.
205. *See id.* at 530.
206. *Id.* at 526, 528; *see* Wertman, *supra* note 4, at 277.
207. *Centerior*, 153 F.3d at 346.
208. 118 F.3d 1298 (9th Cir. 1997).
209. *See* Pearce, *supra* note 15, at 126; *see also Pinal Creek Group*, 118 F.3d at 1306 (holding that "a PRP does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability").
210. *Pinal Creek Group*, 118 F.3d at 1300.
211. *Id.* at 1301.

for the orphan shares "equitably among all PRPs" under § 113.[212] The court explained that applying the joint and several approach to liability for plaintiff-PRPs would be contrary to the purpose of CERCLA.[213] It reasoned that if a court holds a group of defendant-PRPs "jointly and severally liable for the total response costs incurred by a claimant-PRP, reduced by the amount of claimant-PRP's own share, those defendant-PRPs would [have to absorb] all of the cost attributable to 'orphan shares.'"[214] The United States Supreme Court denied Pinal's petition for certiorari, thereby leaving the circuits to continue to decide the issue for themselves.[215]

G. Eleventh Circuit

In *Redwing Carriers Inc. v. Saraland Apartments.*,[216] Redwing knowingly contaminated a site, which Saraland later acquired from subsequent owners.[217] Redwing consented to an administrative order of the EPA under which Redwing would perform a remedial investigation of the contamination.[218] Redwing conducted the investigation, incurring almost $2 million in costs.[219] Redwing then sued Saraland under § 107(a) and § 113(f) to recover some of those costs.[220] The court stated that in order to bring a § 107(a) cost recovery action, Redwing would have to be innocent of contributing to the contamination, which it was not.[221] Therefore, the court concluded that Redwing's claim was one for contribution under § 113(f) "as a matter of law."[222] The court stated that "when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a). Rather, it remains a claim for contribution under § 113(f)."[223]

V. SEVENTH CIRCUIT

A. NutraSweet Co. v. X-L Engineering Co.[224]

1. Facts

NutraSweet owned a food manufacturing plant in Illinois.[225] X-L Engineering ("X-L"), a machine shop, operated its business east of Nu-

212. *Id.* at 1303.
213. *Id.*
214. *Id.*
215. 524 U.S. 937 (1998).
216. 94 F.3d 1489 (11th Cir. 1996).
217. *Redwing Carriers*, 94 F.3d at 1494.
218. *Id.* at 1495.
219. *Id.*
220. *Id.*
221. *Id.* at 1496.
222. *Id.*
223. *Id.* at 1513.
224. 227 F.3d 776 (7th Cir. 2000).
225. *NutraSweet*, 227 F.3d at 780.

traSweet's plant.[226] NutraSweet ordered soil testing of vacant property to the east of its land because it was considering expanding its plant.[227] The test showed high levels of hazardous waste near X-L's property.[228] NutraSweet then hired a company to more thoroughly assess the problem.[229] This company determined that X-L could have caused the contamination.[230] NutraSweet then began to investigate. NutraSweet employees saw an X-L employee dumping wastewater on the west side of X-L's property, so NutraSweet sampled the water and found that it contained hazardous substances.[231] It also took a soil sample from X-L's property where the dumping occurred.[232] This sample contained the same hazardous substances found in the water.[233] NutraSweet videotaped numerous occasions where an X-L employee would dump wastewater next to NutraSweet's property, as well as where the standing wastewater would spill onto NutraSweet's property.[234] Therefore, NutraSweet requested that the Illinois EPA and State Police begin surveillance of X-L.[235] The State Police observed the dumping, tested the wastewater, which contained hazardous substances, and confronted Paul Prikos, X-L's president and principal shareholder owner.[236] NutraSweet cleaned up its property and then sued X-L Engineering and Prikos under CERCLA for improperly disposing of the hazardous waste that contaminated NutraSweet's property.[237]

2. Decision

The Seventh Circuit held that a landowner is strictly liable for hazardous wastes located on his property under § 107(a) of CERCLA, but that landowner may "seek contribution [under § 113(f)] from another person who is liable or potentially liable under § 107."[238]

The Seventh Circuit cited *Akzo Coatings, Inc. v. Aigner Corp.*,[239] where it held that under § 107(a)(B), *any person*, not only innocent parties, may seek recovery of appropriate costs incurred in cleaning up a hazardous waste site.[240] The court also adopted the view that both § 107 and § 113 may be used simultaneously in an action, stating that "§ 107 . .

226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 780-81.
238. *Id.* at 783-84 (quoting Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 326 (7th Cir. 1994)).
239. 30 F.3d 761 (7th Cir. 1994)
240. *NutraSweet*, 227 F.3d at 784 (quoting *Akzo*, 30 F.3d at 764).

. governs liability, while § 113(f) creates a mechanism for apportioning that liability among responsible parties."[241]

In *Akzo*, the EPA issued an administrative order that required emergency removal activities at the landowner's facility.[242] The landowner cleaned the site, spending over $1.2 million.[243] The landowner then sued other PRPs under § 107(a).[244] The Seventh Circuit disallowed the § 107(a) action.[245] In dicta, however, the court noted that the plaintiff could have brought a cost recovery action if he had not actively contaminated the site, thereby creating what courts in later cases have called the "innocent landowner exception."[246] Therefore, a "landowner who, although technically strictly liable for hazardous wastes on its property was innocent of the contamination, would not have to bring a contribution action under § 113(f) (because he did not contribute to the contamination); he could instead bring a 'direct cost recovery action' under § 107(a) against the responsible party."[247] The court, however, found that the exception did not apply in *Akzo* and limited the plaintiff to a § 113(f) contribution claim.[248]

The *NutraSweet* court explained that a § 107(a) action is available when "a landowner [is] forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands."[249] The pivotal issue in this case was whether or not X-L released the hazardous wastes found on NutraSweet's property.[250] The Seventh Circuit found X-L responsible for the hazardous waste on NutraSweet's property.[251] NutraSweet was, therefore, entitled to recover its costs for cleaning up the hazardous waste from X-L.[252]

B. Rumpke of Indiana, Inc. v. Cummins Engine Co.[253]

1. Facts

Plaintiff Rumpke purchased a contaminated landfill after the previous owners told it that they had never accepted hazardous waste at the site.[254] Rumpke then discovered that there had in fact been hazardous

241. *Id.* (alteration in original) (quoting Town of Munster v. Sherwin-Williams Co., 27 F.3d 1268, 1270 (7th Cir. 1994)).
242. *Akzo*, 30 F.3d at 762.
243. *Id.* at 762-63.
244. *Id.* at 764.
245. *Id.*
246. *Id.*
247. *NutraSweet*, 227 F.3d at 784 (quoting *Akzo*, 30 F.3d at 764).
248. *Akzo*, 30 F.3d at 764.
249. *NutraSweet*, 227 F.3d at 784 (alteration in original) (quoting *Akzo*, 30 F.3d at 764).
250. *Id.*
251. *Id.* at 792.
252. *Id.* at 780.
253. 107 F.3d 1235 (7th Cir. 1997).
254. *Rumpke*, 107 F.3d at 1236.

wastes dumped at the site for several years.[255] It cleaned the site voluntarily.[256] Much of the waste at the site came from a recycling corporation no longer in business.[257] Therefore, Rumpke brought a cost claim action against the manufacturers who sent materials to the recycling plant for processing.[258] These manufacturers had already entered into a settlement with the U.S. government and they argued that this barred Rumpke from bringing suit under § 113(f)(2).[259]

2. Decision

The Seventh Circuit held that § 107(a) entitled Rumpke to bring a cost recovery action against the manufacturers to recoup all costs incurred in the cleanup.[260] As discussed earlier, § 113(f)(2) only protects parties from liability in § 113(f) suits relating to matters addressed in the settlement.[261] Here, the settlement that Rumpke entered in to with the U.S. government did not involve the issue of Rumpke's property.[262]

The Seventh Circuit found that its holding in *Akzo* indicated that an exception exists to the rule that PRPs can only bring actions for contribution.[263] The court stated that "when two parties who both injured the property have a dispute about who pays how much . . . , the statute directs them to § 113(f) and only to § 113(f)."[264] However, the court continued, "a class of cases might remain in which a PRP might sue under § 107(a)."[265] The court concluded that there was "nothing in the language of § 107(a) that would make it unavailable to a party suing to recover for direct injury to its own land, under circumstances where it is not trying to apportion costs."[266] Since Rumpke did not try to apportion costs between itself and other PRPs, but instead tried to recoup costs for cleaning up contamination that it alleged was caused by others, the court determined that Rumpke could bring a § 107(a) claim.[267] The court did not require that Rumpke prove that it met the elements of the innocent landowner defense.[268]

255. *Id.*
256. *Id.* at 1239.
257. *Id.* at 1236, 1237.
258. *Id.* at 1237, 1238.
259. *Id.* at 1237.
260. *Id.* at 1236.
261. 42 U.S.C. § 9613(f)(2) (2000).
262. *Rumpke*, 107 F.3d at 1236.
263. *See id.* at 1240.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 1241.
268. McGuire, *supra* note 25, at 543.

VI. ANALYSIS

Courts currently adopt three distinct approaches to the issue of standing under § 107(a) and § 113(f). Almost all of the circuit courts of appeals have aligned themselves with one of these views. Since CERCLA litigation usually involves large sums of money, how previous parties fared in court will affect how later parties handle and dispose of hazardous waste and how later parties respond to contamination of their own land. As discussed below, each view has serious implications for the parties involved as well for the environment because each ruling directly affects the motivation subsequent parties will have to initiate cleanup of hazardous waste sites.

A. Majority View Courts

Under the first approach to the controversy, the majority of courts hold that PRPs may only sue under § 113(f) for contribution and may not sue under § 107(a) for cost recovery.[269] The Tenth Circuit aligns itself with the majority courts.[270] Many courts that limit a PRP to a § 113(f) claim do so based solely on the party's status as a PRP under the statute.[271] This was the reasoning of the Tenth Circuit in *Morrison* and *Colorado Eastern*.[272]

In *Morrison*, the Tenth Circuit looked solely at Morrison's status as a PRP in holding that Morrison could not pursue a § 107(a) cost recovery claim to recoup its costs from McShares: "[B]ecause Morrison is a PRP, it may . . . only proceed with an action for contribution under § [1]13(f)."[273] If the court had allowed Morrison to pursue a cost recovery action, a PRP would have reaped the full advantages of § 107(a), an option the court believes does not comport with the incentives CERCLA was intended to create.[274] One activity CERCLA was intended to promote that would arguably be frustrated is expedient and voluntary cleanup of contaminated sites by the polluter.[275]

However, courts can still act in accordance with the purposes of CERCLA and not relegate PRPs to only § 113(f). The majority view's narrow interpretation of the statute is not necessarily compatible with CERCLA's language and it is a potential threat to CERCLA's policies.[276] "[O]n its face, [§ 107(a)] grants standing to 'any . . . person' who has

269. *See* Hernandez, *supra* note 13, at 107.
270. *See* Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1133 (10th Cir. 2002).
271. *See* Wertman, *supra* note 4, at 277.
272. *Morrison*, 302 F.3d at 1133 (10th Cir. 2002); United States v. Colo. & E. R.R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995).
273. *See Morrison*, 302 F.3d at 1135.
274. *Id.* at 1134.
275. *See* Hernandez, *supra* note 13, at 121.
276. *See* Alexander, *supra* note 101, at 160.

incurred necessary response costs" to clean up a site.[277] Section 107(a) does not read "any *innocent* person."[278] Also, Congress intended to codify existing case law in § 113(f).[279] That existing case law consistently interpreted § 107 broadly and found that it created a cause of action to liable parties (PRPs) and non-liable parties alike.[280] If courts continue to completely disallow cost recovery actions brought by PRPs, they will virtually eliminate the right of private parties to seek joint and several liability since these PRPs only receive judgments for several liability under § 113(f).[281]

The unavailability of joint and several liability when a party is limited to a claim under § 113 can also deter cleanups by private parties.[282] When a court holds a defendant severally liable, the plaintiff may only recoup a small fraction of his cleanup costs.[283] In contrast, where a court holds a defendant jointly and severally liable, the plaintiff can recoup *all* the cleanup costs from one defendant.[284] The plaintiff-PRP also absorbs any orphan share costs when it brings a § 113(f) claim.[285] If a private party knows how expensive, difficult, and perhaps impossible recovering costs would be, that party will be less likely to settle with the government or voluntarily initiate cleanup since it may be left "holding the bag" for the majority of the cleanup costs.[286] The plaintiff-PRP may not even have originally been responsible for many of those cleanup costs if it did not contribute that share of the contamination to the site. Even if the PRP does decide to perform the cleanup, it remains at a disadvantage with respect to other PRPs because it cannot use the threat of joint and several liability to bring other PRPs into negotiation.[287] If a defendant-PRP faces the possibility of a court holding it responsible for *all* the cleanup costs, including outstanding orphan shares, it will willingly negotiate with the plaintiff-PRP in order to minimize its liability and avoid litigation.[288] Therefore, the inadvertent result of restricting PRPs' access to joint and several liability gravely undermines the key CERCLA policy of encouraging settlement.[289]

277. *Id.* (alteration in original).
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 161.
283. *Morrison*, 302 F.3d at 1145.
284. *Id.* at 1134.
285. McCrory, *supra* note 51, at 24.
286. Alexander, *supra* note 101, at 160.
287. *Id.*
288. *See id.*
289. *Id.*

B. Minority View Courts

Under the second interpretation of the controversy, the minority of federal courts of appeals hold that PRPs may sue under § 107(a).[290] Under § 107, a "person" who spends money to clean a contaminated site may sue other PRPs to recover those costs.[291] The definition of "person" under CERCLA does not exclude PRPs who may also have contributed to the contamination.[292] "Therefore, under a literal reading of the statute, a PRP may bring a . . . [§] 107 cost recovery action against fellow PRPs."[293] Similarly, under § 113, a "person" may seek contribution from those who are liable or potentially liable for contaminating a site.[294] Therefore, it appears that a PRP who incurred response costs may seek recovery of its costs under § 107(a) *or* under § 113(f).[295] This view still remains consistent with cases before the SARA amendment that allowed PRPs to bring cost recovery actions, as well as with the dicta in *Key Tronic*.[296]

When courts read the statute literally in this way, they create an exception to the majority court view. That exception allows PRPs substantial leeway to bring cost recovery actions. If courts allow PRPs to bring § 107(a) claims, the result is that the plaintiff-PRPs can recover a joint and several judgment against the defendants and shift all responsibility for any orphan shares to defendants.[297]

The Seventh Circuit adheres to this view.[298] This circuit determines liability based on whether or not a party qualifies as a PRP.[299] However, the circuit mitigates that liability somewhat according to the circumstances in each case.[300] The circumstances that might mitigate a party's liability include: whether or not the party was a PRP by virtue of its status as a landowner; whether the PRP actively contributed to the contamination; and the PRP's knowledge of the contamination before it acquired the property.[301]

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290. *See* Hernandez, *supra* note 13, at 110.

291. *See* Buckley, *supra* note 3, at 851.

292. Buckley, *supra* note 3, at 851; *see* 42 U.S.C. § 9601(21) (2000) ("The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.").

293. Buckley, *supra* note 3, at 851.

294. *Id.* at 852.

295. *Id.*

296. Hernandez, *supra* note 13, at 110.

297. *Id.* at 111.

298. *See* NutraSweet Co. v. X-L Eng'g Co., 30 F.3d 761, 783-84 (7th Cir. 1994).

299. *See NutraSweet*, 30 F.3d at 783-84.

300. *See* Wertman, *supra* note 4, at 281 (quoting *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1239 (7th Cir. 1997)); *see also* McGuire, *supra* note 24, at 545 (explaining that the court relied on the assumption that Rumpke purchased the land without knowledge of the contamination and that all of the contamination had already occurred (quoting *Rumpke*, 107 F.3d at 1239)).

301. *See* Wertman, *supra* note 4, at 281 (quoting *Rumpke*, 107 F.3d at 1239); *see also* McGuire, *supra* note 24, at 545 (explaining that the court relied on the assumption that Rumpke

In *NutraSweet*, the Seventh Circuit affirmed its adoption of the minority view.[302] It stated that under § 107, "any person" may sue to recoup cleanup costs, including, under a literal reading of the statute, PRPs.[303] The court recognized the statute's strict liability, but mitigated NutraSweet's liability to zero because NutraSweet was a PRP and landowner that did not actively contribute to the contamination.[304] In *Rumpke*, the Seventh Circuit again mitigated the PRP's liability because Rumpke did not actually participate in the contamination, his ignorance of the existence of the pollution, and his voluntary cleanup of the site.[305]

"Innocent" parties may bring § 107(a) claims.[306] However, a PRP must successfully assert one of the established affirmative defenses under § 107(b) to establish its innocence.[307] Neither the *NutraSweet* nor the *Rumpke* court required the plaintiffs involved to establish such a defense before declaring them an "innocent" party.[308] The court in each case allowed the circumstances of the case to mitigate the plaintiff-PRP's liability.[309]

The Seventh Circuit's approach does not adhere to CERCLA's strict liability scheme. It allows PRPs to escape PRP status despite the clear definition of PRP in the statute.[310] Lack of knowledge of contamination before purchasing land, lack of actual participation in the contamination, and the voluntariness of the cleanup should not factor in to determine whether or not a party fits the definition of a PRP because these factors are missing from the statute's definition of a PRP.[311] Courts determining which section, § 107(a) or § 113(f), though, may minimize the effect of a party's PRP status without running afoul of CERCLA; a PRP may sue other PRPs under § 113 in order to recoup cleanup costs.

C. The Third View

Under the third approach to the controversy, courts hold that PRPs may bring a § 107(a) cost recovery claim, but then determine liability as if the claim were for contribution under § 113(f).[312] The courts do not treat the claims like governmental cost recovery claims.[313] Unlike the government, the plaintiffs cannot establish joint and several liability and

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purchased the land without knowledge of the contamination and that all of the contamination had already occurred (quoting *Rumpke*, 107 F.3d at 1239)).

302. *See NutraSweet*, 227 F.3d at 784.
303. *Id.*
304. *Id.* at 792.
305. McGuire, *supra* note 25, at 543.
306. *Id.* at 551; *see* Glanvill, *supra* note 31, at 162.
307. McGuire, *supra* note 25, at 551-52.
308. *Id.* at 543; *see NutraSweet*, 227 F.3d at 783-86.
309. McGuire, *supra* note 25, at 543; *see NutraSweet*, 227 F.3d at 785-86.
310. *See* 42 U.S.C. § 9607(a) (defining PRP).
311. *See id.*
312. *See* Hernandez, *supra* note 13, at 112.
313. *Id.*

shift all liability, including responsibility for any orphan shares, to the defendants.[314] Instead, these courts allocate costs, including orphan shares, among PRPs.[315]

The courts that adopt the third view take one of two approaches.[316] Under the first approach, a court applies § 107(a) to determine whether liability *exists*, and § 113(f) to *apportion* liability.[317] Courts following the second approach explicitly affirm the right of a PRP to bring a cost recovery action due to the plain language of § 107(a)(4)(B), but then apportion responsibility among *all* parties, not just the defendants, for any orphan shares.[318] Under this view, no one, including the plaintiff, collects more from another party than the other party's equitably apportioned share.[319] So, even though these courts interpret CERCLA differently than the majority view courts, they achieve essentially the same result because of the way that they allocate liability.[320]

When courts combine § 107(a) and § 113(f), they seem to solve the statutory interpretation problem associated with limiting standing under § 107 because the PRP still brings the action under § 107(a) during the initial phase of litigation.[321] But this does not solve the policy questions raised by limiting joint and several liability in the second phase of litigation, cost apportionment.[322] Under this approach, courts do not allow § 107 and §113 to fulfill their separate functions.[323] As the Supreme Court noted in *Key Tronic*, and as the different statutes of limitations for the two sections demonstrate, these provisions provide distinct causes of action.[324] Also, a court does not have to apportion liability when an action is brought under § 107(a).[325] If the harm is not divisible, the plaintiff will usually obtain a judgment for joint and several liability, allowing the plaintiff to shift all liability to any defendant.[326] If the defendant never brings a claim for contribution in response to a plaintiff's claim under § 107(a), no court will ever apportion the costs.[327]

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314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at 111-12.
318. *Id.* at 112.
319. Ann Alexander, *Toward a Comprehensive Understanding of the Relationship Between CERCLA §§ 107 and 113* (pt. 2), 10 TOXICS L. REP. 184, 185 (1995) [hereinafter Alexander II].
320. Hernandez, *supra* note 13, at 112-13.
321. Alexander II, *supra* note 319, at 185.
322. *Id.*
323. *See* Hernandez, *supra* note 13, at 96-97.
324. *Id.* at 129.
325. *Id.*
326. *Id.*
327. *Id.*

VII. PROPOSED SOLUTIONS TO THE CONTROVERSY

A. Cost Recovery for Parties Who Initially Clean a Site

Joint and several liability is the key to CERCLA's success. A better solution, therefore, would determine which plaintiffs most need joint and several liability "as a matter of practicality and sound policy," and allow those plaintiffs to bring § 107(a) actions, entitling them to collect all of their costs from the many defendants.[328]

Courts would allow a § 107(a) claim for only those parties who perform a cleanup themselves and incur necessary remediation costs.[329] Only money directly spent to remediate a site, and not money paid to reimburse another party who performed remediation, would be included in necessary costs.[330] "This approach [would] preserve[] the integrity of the broad language of § 107, while permitting effective resolution of the policy dilemma inherent in defining standing under that section."[331] This approach would also encourage private parties to enter into settlement agreements by shifting the risks of uncertain liability and uncollected costs to those who refused to actively participate in the cleanup.[332]

Commentators also favor using this approach when a PRP voluntarily remediates a site.[333] Even though the PRP remains partially responsible for the contamination at the site, its voluntary cleanup is the exact conduct that Congress invited by enacting CERCLA and the statute should be used to reward the PRP.[334] Allowing the PRP to bring a § 107(a) claim will provide an incentive for other PRPs to voluntarily remediate sites, thereby furthering a primary goal of CERCLA.[335] The reward for voluntary cleanups would be a joint and several judgment against other PRPs.[336] Courts should encourage expedient, voluntary remediation of hazardous waste and allocate cleanup costs equitably by requiring the defendant-PRPs alone to bear responsibility for orphan shares.[337] If a court forces the PRP who voluntarily cleaned the site to pay part of the orphan shares, then PRPs in subsequent cases will have almost no incentive to cleanup sites voluntarily, since they will bear more than the cost of their own contamination.[338]

It would also be inconsistent for a court to require the PRP who cleaned the site to pay part of the orphan shares, while imposing joint

328. Alexander II, *supra* note 319, at 186.
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. Hernandez, *supra* note 13, at 121; Pearce, *supra* note 15, at 136-37.
334. Hernandez, *supra* note 13, at 121.
335. *Id.*
336. *Id.* at 113.
337. *Id.*
338. *Id.* at 122-23.

and several judgment on the PRPs who did not participate in the cleanup.[339] The PRP who cleaned the site bore the entire responsibility for the cleanup and paid the shares of all PRPs.[340] It would, therefore, be inequitable to shift part of those orphan shares back to the PRP who cleaned the site.[341] Furthermore, shifting all costs to the other PRPs serves the goal of imposing costs on those responsible for the pollution.[342]

B. Contribution Claims Only for Parties Who Do Not Participate in Cleanup

Under another proposed solution, if a PRP does not clean the site, but simply seeks to share liability imposed on him, the PRP may only bring a § 113(f) action for contribution.[343] PRPs who did not clean the site have not incurred any response costs.[344] These PRPs are, therefore, suing to reallocate the liability already imposed on them, the essence of a claim for contribution, and should not be allowed to bring a cost recovery claim.[345] All PRPs, including the PRP who sues, will be proportionately liable for the cleanup costs, including any orphan shares.[346]

If courts allow PRPs who did not participate in the cleanup to bring cost recovery actions, § 107(a) and §113(f) will be interchangeable.[347] In that situation, plaintiffs would always prefer a § 107(a) claim because it offers joint and several liability.[348] No one would ever bring a claim under § 113(f).[349] Congress did not intend this interpretation because it would make § 113(f) meaningless.[350]

C. Cost Recovery or Contribution for Parties Ordered to Clean a Site

A third solution is to allow a PRP to bring either a cost recovery action or a contribution claim when the PRP is compelled to clean a site, for example, by order of the EPA.[351] This approach is consistent with the U.S. Supreme Court's interpretation of CERCLA.[352] In *Key Tronic*, the Court said: "[CERCLA] expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107."[353] Section 107(a) does not specify that only

339. *Id.* at 123.
340. *Id.*
341. *Id.* at 122, 123.
342. *Id.* at 123.
343. *Id.* at 114-15.
344. *Id.* at 114.
345. *Id.* at 114-15.
346. *See id.* at 116.
347. *Id.* at 115.
348. *Id.*
349. *Id.*
350. *Id.* at 115, 116.
351. *Id.* at 124.
352. *Id.*
353. *See* Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994).

innocent parties and parties who clean a site voluntarily may seek cost recovery.[354] As long as the PRP meets the requirements of § 107(a), the PRP may bring a cost recovery claim.[355]

A claim for contribution should also be available to a PRP who is ordered to clean a site.[356] In this situation, the PRP was not only obligated to clean the site, but the PRP also incurred costs that he can recoup through a contribution claim.[357] Regardless of the nature of the claim, however, courts should require plaintiff-PRPs to pay a portion of the orphan shares.[358] The result would be equitable.[359] In addition, distributing liability for the orphan shares in this situation would create a powerful incentive for other PRPs to clean up sites promptly and voluntarily.[360] Only then would PRPs avoid paying a portion of any orphan shares.[361]

CONCLUSION

Persuasive policy considerations support allowing PRPs to bring cost recovery actions, with the resulting benefits inducing PRPs in a position to cleanup a Superfund site to so act. A plaintiff-PRP who is allowed to bring a cost recovery claim can recover a joint and several judgment against the defendants and shift full responsibility for any orphan shares.[362] If a plaintiff-PRP can choose to sue under either § 107(a) or § 113(f), he can still control the lawsuit, "evaluating the potential for prevailing on a cost recovery claim based on the 'innocence' of his actions."[363]

The solutions described in this survey demonstrate that there is a middle ground between the views of the Tenth and Seventh Circuits. Both of the circuits attempt to remain true to the purposes of CERCLA. The Tenth Circuit does that by barring a liable party, a PRP, from recovering *all* costs under § 107(a) when that party is responsible for some of the costs.[364] On the other hand, the Seventh Circuit adheres to judicial interpretations of CERCLA before it was amended by SARA, which conclude that a PRP may have standing under § 107(a).[365] However, courts that adopt the proposed solutions discussed herein will more fully

354. Hernandez, *supra* note 13, at 124.
355. *Id.*
356. *Id.*
357. *Id.* at 124-25.
358. *Id.* at 125.
359. *Id.*
360. *Id.* at 126.
361. *Id.*
362. *Id.* at 111.
363. Glanvill, *supra* note 31, at 179.
364. *See* Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1132-36 (10th Cir. 2002).
365. *See* Hernandez, *supra* note 13, at 96; *see also* NutraSweet Co. v. X-L Eng'g Co., 227 F.3d 776, 784 (7th Cir. 2000) (citing previous cases where the Seventh Circuit stated that a PRP could sue under § 107).

satisfy Congress's intent—that responsible parties cleanup polluted sites quickly and voluntarily.

This controversy has been long-standing. The solutions proposed in this survey might assist courts in adopting more equitable and practical solutions for the parties that come before them. This complicated issue requires courts to thoroughly understand the nature of the controversy. It is unlikely that majority view courts will adopt any of the proposed solutions because of the entrenched precedent. Therefore, to resolve the issue for all courts, Congress needs to amend CERCLA to clarify the issue of standing under § 107(a) and § 113(f) or the Supreme Court needs to decide a case directly on point.

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